APPENDIX A

Anthony Paul MAXWELL,
Petitioner-Appellee,

v.

G. W. SUMNER, Warden, San Quentin Prison, Respondent-Appellant.

No. 81-5349.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1981.

Decided Feb. 25, 1982.

As Amended on Denial of Rehearing and Rehearing En Banc April 21, 1982.

Before ANDERSON and NORRIS, Circuit Judges, and MUECKE,* District Judge.

NORRIS, Circuit Judge:

This is an appeal by the Warden of San Quentin prison from an order of the district court granting appellee Anthony Paul Maxwell's petition for writ of habeas corpus.

In July, 1975, Maxwell was convicted in California of robbery and assault with a deadly weapon. Maxwell appealed his conviction to the California

*The Honorable C. A. Muecke, Chief United States District Judge for the District of Arizona, sitting by designation.

Court of Appeal, claiming, inter alia, that the trial court erred in denying his motion to proceed in propria persona. After the Court of Appeal affirmed his conviction, Maxwell unsuccessfully petitioned for a hearing in the California Supreme Court.

Maxwell then raised his self-representation claim in a petition to the California Supreme Court for a writ of habeas corpus. The petition was denied with a citation to In re Waltreus, 62 Cal.2d 218, 225, 397 P.2d 1001, 1005, 42 Cal.Rptr. 9, 13, cert. denied, 382 U.S. 853, 86 S.Ct. 103, 15 L.Ed.2d 92 (1965). The instant petition followed. After reviewing the record, the district court ruled that the state trial court erred in denying Maxwell's motion to proceed in propria persona. The district court found that Maxwell's request for self-representation was neither "outlandish" nor made for the purpose of delay, as the state trial court had concluded. Therefore, in light of Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 2541-42, 45 L.Ed.2d 562 (1975), which holds that the Sixth Amendment affords every criminal defendant the right "knowingly and

intelligently" to forgo his right to counsel, the district court granted Maxwell's petition for writ of habeas corpus.

Appellant raises three issues on appeal. First, he argues that Maxwell waived his right to assert his self-representation claim in a federal habeas petition by failing to raise the issue on direct appeal to the California Supreme Court. Second, appellant asserts that even if no waiver occurred, Maxwell had no right of self-representation at the time of his trial because Faretta was decided after Maxwell's conviction and is not retroactive. Finally, appellant contends that Maxwell's conduct at trial justified the state court's denial of his motion to proceed in propria persona.

I.

In his petition for a hearing in the California Supreme Court, Maxwell did not advance the trial court's denial of his propria persona motion as a reason for the Supreme Court to hear his case. Relying on Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), appellant contends that by this omission Maxwell waives his right to raise the

self-representation issue in state (and therefore federal) habeas corpus.

Failure to comply with state procedural rules may bar federal habeas review of the underlying federal claim, absent a showing of "cause" for the failure and actual "prejudice" resulting from the alleged constitutional violation. Wainwright v. Sykes, supra; Myers v. Washington, 646 F.2d 355 (9th Cir. 1981). In Sykes, petitioner had failed at trial and apparently on direct appeal to challenge the admissibility of statements allegedly obtained in violation of his Miranda rights. 433 U.S. at 75 & n.3, 97 S.Ct. at 2500 & n.3. He apparently first challenged the use of the statements in an unsuccessful state habeas petition. Id. The Supreme Court held that petitioner's failure to comply at trial with the state's contemporaneous-objection rule constituted an "independent and adequate state ground" for the state court judgment, barring federal habeas review unless petitioner could show cause and prejudice. Id. at 86-87, 97 S.Ct. at 2506-07.

Circuit courts have applied the Sykes rule to procedural defaults at the

appellate level. Myers v. Washington, supra; Forman v. Smith, 633 F.2d 634 (2nd Cir. 1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1710, 68 L.Ed.2d 204 (1981). In Myers, the Washington Supreme Court had rejected a state prisoner's habeas petition because the petitioner had failed to comply with a state rule requiring an issue to be raised on direct appeal before it could be raised as grounds for collateral attack. 646 F.2d at 357. We held that the procedural default was an independent and adequate state ground precluding federal habeas review of all but one issue, for which petitioner had shown cause and prejudice. Id.

In both Wainwright and Myers, federal habeas review was barred because the state court's denial of petitioner's federal claim rested on a procedural default, not on the merits of the claim. For reasons of comity and respect for the function of procedural rules in our judicial system, courts view the failure to present a federal claim in accordance with certain state procedural rules to be an independent and adequate ground for a state court judgment. See County Court v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213,

2223, 60 L.Ed.2d 777 (1979); Sykes, 433 U.S. at 88-90, 97 S.Ct. at 2507-08. "But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." County Court v. Allen, 442 U.S. at 154, 99 S.Ct. at 2223.

Sykes and Myers are inapplicable to this case because no independent and adequate state procedural ground exists; the state courts denied Maxwell's federal claim on the merits. Maxwell's state habeas petition was denied with a citation to In re Waltreus, supra, which involved a state habeas petition raising various claims of trial court error. The California Supreme Court denied the petition, stating that "[t]hese arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." 62 Cal.2d at 225, 397 P.2d 1001, 42 Cal.Rptr. 9. Waltreus, thus holds that arguments rejected on appeal will not be reviewed again in habeas; by citing Waltreus in its denial of Maxwell's habeas petition, the California Supreme Court stated by clear implication that Maxwell's

self-representation claim had been considered and rejected on the merits on direct appeal.

Appellant interprets Waltreus as holding that California habeas corpus relief is barred if the issue on which the prisoner seeks relief was not raised on direct appeal to the California Supreme Court. We believe appellant misreads Waltreus. Appellant's interpretation -- that a state prisoner waives his right to habeas review if he does not raise the habeas issue on direct appeal to the California Supreme Court -- assumes that California has a rule similar to the rule relied on by the Washington Supreme Court in Myers. We find no such rule.[1] More

1. Moreover, we believe that Maxwell effectively raised his self-representation claim to the California Supreme Court. The purpose of a petition for a hearing in the California Supreme Court is to convince that court to exercise its discretion to hear the case. See Cal.Civ. & Crim.Court Rules, App. Rules 28(a), 29 (West 1981). Yet if a claim has been briefed and argued before the court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim. Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535, 541 n.1, 439 P.2d 903, 907 n.1, 67 Cal.Rptr. 775, 779 n.1 (1968). Every petition for a hearing in the California Supreme Court

Continued

importantly, if such a rule does exist, the California Supreme Court did not invoke it in denying Maxwell's habeas petition; rather, the court indicated, by citing Waltreus, that petitioner's claim had been rejected on its merits by the California Court of Appeal. We thus find no independent and adequate state procedural ground for denying Maxwell's self-representation claim,[2] and we hold

Footnote continued:
must contain a copy of the court of appeal's opinion. Cal.Civ. & Crim.Court Rules App. Rule 28(d)(2) (West 1981). More importantly, when the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition." Menchaca, 678 Cal.2d at 541 n.1, 439 P.2d at 907 n.1, 67 Cal.Rptr. at 779 n.1 (1968); see also Chavez v. Sargent, 52 Cal.2d 162, 186 n.10, 339 P.2d 801, 817 n.10 (1959). Thus, we believe that Maxwell's petition to the California Supreme Court effectively presented his self-representation claim for review in that court.

2. Nor do we find that petitioner failed to exhaust his state remedies. By raising the constitutional issue before the state trial court, then the court of appeal, and finally by petitioning the state supreme court, first for a hearing and then for a writ of habeas corpus, petitioner has

Continued

that Maxwell is not barred from seeking federal habeas relief.[3]

II

The State next contends that Faretta does not apply retroactively and that Maxwell therefore had no right of self-representation at the time of his trial.

In Faretta, the Court held that an accused has a Sixth Amendment right to choose "knowingly and intelligently" to represent himself at trial. Under pre-Faretta Ninth Circuit law, a state

Footnote continued:
clearly given the state of California an initial "opportunity to pass upon and correct" the alleged violation of his federal rights. Fay v. Noia, 372 U.S. 391, 438, 83 S.Ct. 822, 848, 9 L.Ed.2d 837 (1963); see Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). More importantly, California has no procedure available under which petitioner could have raised the self-representation claim again, see In re Waltreus, supra, and federal habeas review is thus proper. 28 U.S.C. § 2254(c).

3. The district court held that Sykes applied to Maxwell's habeas petition, but that there was sufficient "cause" and "prejuice" to overcome the independent and adequate state ground otherwise barring federal habeas relief. Since we hold that Sykes is inapplicable to the instant case, we do not reach the issue of "cause" and "prejudice."

defendant already had a constitutional right of self-representation equivalent to the right recognized in Faretta. Bittaker v. Enomoto, 587 F.2d 400, 401-402 (9th Cir. 1978), cert. denied, 441 U.S. 913, 99 S.Ct. 2013, 60 L.Ed.2d 386 (1979). Thus, Maxwell had a right to proceed in propria persona, even though his trial occurred before Faretta was decided.

III

Finally, appellant contends that the state trial court's denial of Maxwell's request to proceed in propria persona was justified by Maxwell's disruptive behavior during trial, by the lateness of Maxwell's motion, and by Maxwell's intent to use the motion for the purpose of delay.

The district court in a habeas corpus proceeding must presume that the state trial court's factual determinations are correct, 28 U.S.C. § 2254(d), unless a "determination is not fairly supported by the record." 28 U.S.C. § 2254(d)(8). To withstand appellate scrutiny, the federal habeas court must state its reasons for concluding that the state finding was "not fairly supported by the record." Sumner v. Mata, 449 U.S. 539, 551, 101 S.Ct. 764,

771, 66 L.Ed.2d 722 (1981). In this case, the district court reviewed the state trial court transcript and concluded that nothing in the record supported the state trial court's determination that Maxwell's behavior caused him to forfeit his right of self-representation:[4]

> There are no specific instances of conduct alluded to in the record that might be considered outlandish. There is no indication in the record as to what actions the state court based its characterization of petitioner's behavior. Respondent neglects to refer to any specific instances of conduct in the record that would support the state court's characterization of petitioner's behavior. Additionally, there is simply no evidence in the record to support the conclusion that the pro se request was

4. Relying on Rhinehart v. Gunn, 661 F.2d 738 (9th Cir. 1981), and Davis v. Morris, 657 F.2d 1104 (9th Cir. 1981), the State argues that we should remand to give the state trial court an opportunity to state its reasons for denying Maxwell's motion for self-representation. It would be an empty exercise to remand in this case, as the state court's reasons for denying Maxwell's petition are clear on the face of the record.

> untimely or would have resulted in undue delay. Petitioner's pro se request was well taken and not conditioned upon the granting of a continuance. The record is contraposed to the state court's finding.

Maxwell v. Sumner, No. CV 78-820-RMT, slip op. at 6-7 (C.D.Cal. April 29, 1981).

The findings that Maxwell engaged in no outlandish behavior and that his motion was not made for the purpose of delay are based on "the fact-finding tribunal's experience with the mainsprings of human conduct," see Commissioner v. Duberstein, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed.2d 1218 (1960), and on its experience in conducting trials and oberving defendants' behavior. We therefore review the district court's determinations as findings of fact, which, although based solely on documentary evidence, will be set aside only if clearly erroneous. Lundgren v. Freeman,

* * * *

307 F.2d 104, 113-15 (9th Cir. 1962).[5]

We hold that the district court's factual findings were not clearly erroneous. We agree with the district court that there is no basis in the record

5. Fed.R.Civ.P. 52(a) states in pertinent part:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In some circuits, when a district court's findings of fact are derived from purely documentary evidence or from stipulated facts, the findings are not accorded the deference of a "clearly erroneous" standard of review, because no question of credibility is involved. See Merchants National Bank & Trust Co. v. United States, 246 F.2d 410 (7th Cir.), cert. denied, 355 U.S. 881, 78 S.Ct. 148, 2 L.Ed.2d 112 (1957); Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir.), cert. denied, 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 595 (1950).

The view of this circuit, however, which is based on the history and purposes of Rule 52(a), is to the contrary. See Lundgren v. Freeman, 307 F.2d at 114. Moreover, deference to the judgment of the district court is warranted in this case, because the trial judge, with his special expertise in conducting trials, is in a better position to judge whether a defendant's behavior was outrageous or his motion for self-representation was made with the intent to delay the trial.

for the state trial court's description of Maxwell's behavior as "outlandish." Additionally, because Maxwell's request to represent himself at trial was made prior to jury selection and the district court found that it was not made for the purpose of delay we hold that it was timely as a matter of law. Chapman v. United States, 553 F.2d 886 (5th Cir. 1977). See United States v. Price, 474 F.2d 1223, 1226-27 (9th Cir. 1973).

For the foregoing reasons, the judgment of the district judge is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY PAUL MAXWELL, Petitioner, v. G. W. SUMNER, Warden, San Quentin Prison, Respondent.	No. CV 78-820-RMT ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

This matter having come before this court for hearing on April 27, 1981, and this court, pursuant to 28 U.S.C. 636(b)(1), having conducted a de novo determination of those portions of the U.S. Magistrate's findings and recommendations which have been objected to, having considered the argument of counsel and the pleadings and other documents filed herein, and having filed its Memorandum.

IT IS ADJUDGED that the petitioner is entitled to a writ of habeas corpus from this court, having been convicted in violation of the Constitution of the United States.

IT IS ORDERED that a writ of

habeas corpus will issue unless the respondent and the State of California shall, within sixty days from the date the court's judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order and the Judgment, by United States mail, on petitioner, petitioner's counsel, the Attorney General of the State of California, and the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles. corpus from this court, having been convicted in violation of the Constitution of the United States.

IT IS FURTHER ORDERED that the effective date of this Order will be stayed until April 30, 1981.

DATED: April 29, 1981.

ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY PAUL MAXWELL, Petitioner,	)	No. CV 78-820-RMT
v.	)	MEMORANDUM
G. W. SUMNER, Warden, San Quentin Prison, Respondent.	)	

This matter having come before this court on April 27, 1981, and this court, having considered the argument of counsel and the pleadings and other documents filed herein, this court hereby makes a de novo determination of those portions of the U. S. Magistrate's findings and recommendations as to which objections have been made:

PROCEDURAL BACKGROUND

On July 30, 1975, petitioner was sentenced to state prison in Los Angeles Superior Court. On September 16, 1976, petitioner's conviction was affirmed by the California Court of Appeals. On October 25, 1976, petitioner filed

petition for hearing before the California Supreme Court, which was subsequently denied.

On August 8, 1977, petitioner filed a petition for a writ of habeas corpus in the California Supreme Court, which was denied on October 6, 1977.

On March 3, 1978, petitioner filed his petition for writ of habeas corpus in this court. On May 14, 1979, the U. S. Magistrate filed his final report and recommendation recommending that a writ be conditionally granted. On May 15, 1979, this court entered its order for a conditional granting of a writ of habeas corpus.

Respondent appealed this court's May 15, 1979 order to the Ninth Circuit Court of Appeals which on July 10, 1980 reversed this court's May 15, 1979 order and remanded the action for this court's de novo determination of those portions of the Magistrate's findings to which objections have been made pursuant to 28 U.S.C. 636(b)(1).

The de novo determination concerning the Magistrate's findings and recommendation came before this court for hearing on April 27, 1981.

ISSUES

The only issues before this court at the April 27, 1981 hearing were whether petitioner's failure to raise the issue of self-representation on direct appeal to the California Supreme Court bars this court's review of the issue on federal habeas corpus, and whether petitioner had been denied the right of self-representation at trial.

STATE PROCEDURAL DEFAULT

Petitioner failed to raise the issue of self-representation on direct appeal to the California Supreme Court. Petitioner did raise the issue on a petition for a writ of habeas corpus to the California Supreme Court, which petition was denied. Petitioner's failure to appeal the issue directly to the California Supreme Court constituted a procedure violation that prevented further consideration of the issue in state courts. This type of state procedural default constitutes an adequate, independent state ground sufficient to bar federal habeas corpus review of the issue absent a showing of "cause" and "prejudice" attending the procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977).

Because "the denial of the right [to self-representation] automatically prejudices the defendant's freedom interest," Bittaker v. Enomoto, 587 F.2d 400, 403 (9th Cir. 1978), this court concludes that the requirement of "prejudice" under Wainwright has been met. See also Faretta v. California, 422 U.S. 806 (1975).

This court concludes that petitioner has also met the "cause" requirement set out in Wainwright. On February 11, 1976, the California Supreme Court decided People v. McDaniel, 16 Cal. 3d 156 (1976) which held that Faretta was not to be applied retroactively. Under McDaniel, the right to self-representation enunciated in Faretta was unavailable to petitioner since petitioner was tried prior to Faretta, and, therefore, subject to the earlier decision of People v. Sharp, 7 Cal. 3d 448 (1972) where the court held that there was no constitutional right to self-representation. On October 25, 1976 when petitioner filed a petition for hearing in the California Supreme Court, the issue of self-representation was not raised. The reason this issue was not raised was because

counsel on appeal decided that to raise the issue would be futile given the court's decision in McDaniel. This court concludes that, given the then recent decision of McDaniel, it is certain that it would have been futile for petitioner's appellate counsel to raise the issue of self-representation on direct appeal to the California Supreme Court.

The instant action is clearly distinguishable from the case of Estelle v. Williams, 425 U.S. 501 (1976). In Estelle, the court held that petitioner's failure to raise at the time of trial an objection to being garbed in a prison uniform due to a mistaken belief that it was the custom of the court not to allow civilian attire, did not constitute cause. In Estelle, there was no reasonable basis for petitioner's belief, and, in fact, it was later revealed that not only did such a custom not exist in that jurisdiction, but that the presiding trial judge had a custom of allowing civilian attire and would have sustained petitioner's objection had it been made.

This court concludes that despite petitioner's state procedural default, he has in fact met the requirements of

Wainwright, thus allowing this court to review the issue on federal habeas corpus.

SELF-REPRESENTATION

In light of Faretta, supra, and Bittaker, supra, this court concludes that petitioner, although tried prior to the issuance of the decision in Faretta, had a right to self-representation at trial. In Faretta, the court held that the Sixth Amendment affords every criminal defendant the right to self-representation. In Bittaker, the Ninth Circuit held that even prior to Faretta the right to self-representation had been the law of the Ninth Circuit.

The right to self-representation may be forfeited either if the defendant engaged in disruptive behavior or if the motion for self-representation is viewed as untimely and resulting in delay. U.S. v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Illinois v. Allen, 397 U.S. 337 (1970).

Petitioner's request to proceed pro se was made prior to the commencement of trial and prior to jury empanelment, and was not conditioned upon, or accompanied by, a motion for a continuance. Petitioner's request was timely. Chapman

v. U.S., 553 F.2d 886 (5th Cir. 1977).

Petitioner's actions during the time period proximate to his pro se request cannot be characterized as either disruptive or outlandish.

This court rejects the state trial court's conclusory statements that the petitioner's motion was made in "an attempt to delay the trial," and that petitioner's conduct was "outlandish."

In a federal habeas corpus proceeding contesting state custody, 28 U.S.C. § 2254 provides:

> ". . . a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,
>
> (8) . . . unless . . . the Federal court on a consideration of such part of the record as a whole concluded that such factual determination is not fairly supported by the record."

The court rejects the trial court's conclusory statements because it finds no basis for them in the record. There are no specific instances of conduct alluded to in the record that might be considered outlandish. There is no indication in the record as to what actions the state court based its characterization of petitioner's behavior. Respondent neglects to refer to any specific instances of conduct in the record that would support the state court's characterization of petitioner's behavior. Additionally, there is simply no evidence in the record to support the conclusion that the pro se request was untimely or would have resulted in undue delay. Petitioner's pro se request was well taken and not conditioned upon the granting of a continuance. The record is contraposed to the state court's finding.

This court finds that petitioner's right to self-representation as guaranteed by the Sixth Amendment of the Constitution of the United States was violated at the state trial. Therefore,

* * * *

petitioner is entitled to a writ of habeas corpus from this court.

Dated: April 29, 1981.

ROBERT M. TAKASUGI
United States District Judge